Jimmy Choo Lim Hian @ Chu Lim Hia v Liew Nyit Fah & Ors

HIGH COURT (KUCHING) — SUIT NO KCH-22NCVC-66/11 OF 2014 (HC3)
SUPANG LIAN J
31 JULY 2019

Contract — Specific performance — Sale and purchase of land — Whether deceased entered into agreement with plaintiff for sale and purchase of land — Whether deceased breached agreement — Whether deceased committed act of fraud — Whether plaintiff entitled to specific performance

Evidence — Adverse inference — Failure of plaintiff to call witness — Failure to call witness who attested agreement — Whether adverse inference should be drawn

Land Law — Indefeasibility of title — Fraud — Competing interest on ownership of land — Whether fraud pleaded — Whether third defendant was bona fide purchaser for value or whether third defendant was a party to fraud thereby defeating his indefeasibility

The deceased was the owner of a plot of land known as Lot 53. The plaintiff claimed that via a sale and purchase agreement dated 27 October 1993 ('exh P1'), the deceased had sold to him an undivided portion of Lot 53 approximately an acre in size ('the land'). The deceased had subsequently obtained the approval for subdivision of Lot 53, nevertheless, instead of transferring the land to the plaintiff, the deceased had sold Lot 53 to the third defendant. The transfer of Lot 53 to the third defendant was only made by the first and second defendants as the administrators of the estate of the deceased after the deceased had passed away. The plaintiff brought the present action against the defendants alleging that the transfer of Lot 53 by the first and second defendants to the third defendant was an act of fraud against the plaintiff's rights and interest in the land. The plaintiff claimed specific performance against the first and second defendants and an order against the third defendant to transfer to him the one acre of Lot 53 that he had bought, and which had been approved for subdivision. The issues raised by the parties were: (a) whether the plaintiff had entered into an agreement with the deceased for the purchase of one acre of Lot 53 from the deceased; (b) whether the plaintiff being a purchaser under the agreement had acquired an interest in law and in equity in Lot 53; (c) whether the transfer of the entire rights and interest in Lot 53 by the first and second defendants to the third defendant was wrongful and an act of fraud against the plaintiff's rights, title and interest in

the land; (d) whether the third defendant was a bona fide purchaser for value or whether the third defendant was a party to fraud thereby defeating his indefeasibility — in relation to this issue, the third defendant submitted that fraud was not pleaded against the third defendant; and (e) whether the plaintiff was entitled to specific performance of the sale and purchase agreement or alternatively other equitable reliefs.

Held, allowing the plaintiff's action:

(1) The plaintiff and PW2 had both identified exh P1 as the agreement that PW2 had prepared for the plaintiff and the deceased based on their instructions. PW2 further testified that he saw the parties signing the agreement before one Mr Joseph as the Sarawak Administrative Officer. Further, PW2 had seen the deposit and part payment of RM4,000 being paid by the plaintiff to the deceased. Based on the above evidence and the fact that the defendants had never disputed the existence of the agreement in their statement of defence, the court was satisfied that the plaintiff and the deceased had entered into the agreement dated 27 October 1993, which was exh P1, whereby the deceased had sold to the plaintiff one acre of Lot 53. The deceased was bound by this agreement and so were the administrators of his estate (see paras 12, 15–16 & 18).

(2) With regards to the defendants' argument that adverse inference should be drawn for the non-calling of Mr Joseph, the court was of the view that Mr Joseph's presence in the court was unnecessary because all he would be saying in court was that he had acted as a witness to the signing of the agreement and attested the agreement. But the court already had the evidence of the plaintiff and PW2 on this. Further, the agreement as attested by Mr Joseph was before the court as exh P1. There was nothing else for the plaintiff to prove that needed Mr Joseph's evidence. For that reason, there was no question of drawing any adverse inference against the plaintiff for not calling Mr Joseph to testify (see para 17).

(3) In selling Lot 53 in its entirety to third defendant, the deceased knew that: (a) he had sold the one acre portion of it to the plaintiff; (b) that the plaintiff had built his house on that portion in accordance with the terms of the contract, and (c) that the subdivision had been approved and completed and was only awaiting his surrender of the parent title deed and the rent payment booklet so that individual titles could be processed. Thus, the deceased was not only in breach of his contractual obligations under the exh P1, he had also committed an act of fraud against the plaintiff. For these reasons, the plaintiff was entitled to specific performance of the sale and purchase agreement between him and the deceased (see paras 43–44).

(4) On the contention that fraud was not pleaded, since the defendants had agreed for fraud to be determined at the trial and did not at any time take objection to there being lack of particulars of fraud, it could only mean that they were not prejudiced by the lack of particulars of fraud (see paras 71–73 & 75).

(5) Given the unchallenged evidence of the plaintiff that he had started constructing his house on Lot 53 in the year 1995, the third defendant would have known as early as 1995 that the plaintiff owned the portion of land where his house stood. Further, the third defendant who had viewed Lot 53 with a broker named Sharkawi must have known that the house that he saw there was occupied and belonged to the plaintiff. With the demise of the deceased, and the plaintiff still in the dark about the approval of the subdivision of the land and had not taken any action to caveat his interest in the land, Sharkawi, the first and second defendants and the third defendant in July 2009 signed the memorandum of transfer which was submitted for registration to the Lands and Surveys Department. By doing so, Sharkawi and the defendants had acted dishonestly to defraud the plaintiff of his one-acre land in Lot 53. The transfer of the entire rights in Lot 53 by the first and second defendants to the third defendant was therefore wrongful and an act of fraud against the plaintiff's rights, title and interest in the land. As such, the third defendant was not a bona fide purchaser for value and his title in Lot 53 was defeasible (see paras 80, 88 & 90–91).

[Bahasa Malaysia summary

Si mati adalah pemilik plot tanah yang dikenali sebagai Lot 53. Plaintif mendakwa bahawa melalui perjanjian jual beli yang bertarikh 27 Oktober 1993 ('eksh P1'), si mati telah menjual kepadanya sebahagian Lot 53 yang belum dipecah sempadan yang bersaiz kira-kira satu ekar ('tanah tersebut'). Si mati kemudian mendapat kelulusan untuk pemecahan sempadan bagi Lot 53, namun, si mati tidak memindahkan tanah kepada plaintif malahan menjual Lot 53 kepada defendan ketiga. Pemindahan Lot 53 kepada defendan ketiga hanya dibuat oleh defendan pertama dan kedua sebagai pentadbir harta pusaka si mati setelah si mati telah meninggal dunia. Plaintif memfailkan tindakan semasa terhadap defendan-defendan atas dakwaan bahawa pemindahan Lot 53 oleh defendan pertama dan kedua kepada defendan ketiga adalah tindakan fraud terhadap hak dan kepentingan plaintif ke atas tanah tersebut. Plaintif menuntut tindakan spesifik terhadap defendan pertama dan kedua dan perintah terhadap defendan ketiga untuk memindahkan kepadanya satu ekar daripada Lot 53 yang telah dibeli oleh plaintif, dan yang telah diluluskan untuk pemecahan sempadan. Isu yang dibangkitkan oleh pihak-pihak adalah: (a) sama ada plaintif telah memasuki perjanjian dengan si mati untuk membeli satu ekar tanah daripada Lot 53 dari si mati; (b) sama ada plaintif sebagai pembeli berdasarkan perjanjian telah memperoleh kepentingan dalam

undang-undang dan ekuiti dalam Lot 53; (c) sama ada pemindahan hak dan kepentingan dalam Lot 53 oleh defendan pertama dan kedua kepada defendan ketiga adalah salah dan suatu tindakan fraud terhadap hak, hakmilik dan kepentingan plaintif ke atas tanah tersebut; (d) sama ada defendan ketiga adalah pembeli bona fide untuk nilai atau sama ada defendan ketiga adalah pihak kepada fraud dan dengan itu kepentingannya ke atas tanah boleh disangkal — berhubung dengan isu ini, defendan ketiga berhujah bahawa fraud tidak diplidkan terhadap defendan ketiga; dan (e) sama ada plaintif adalah berhak kepada tindakan spesifik perjanjian jual beli atau secara alternatifnya, lain-lain pelepasan ekuiti.

Diputuskan, membenarkan tindakan plaintif:

(1) Plaintif dan PW2 telah mengenal pasti eksh P1 sebagai perjanjian yang telah disediakan oleh PW2 untuk plaintif dan si mati berdasarkan arahan mereka. PW2 selanjutnya memberi keterangan bahawa dia melihat pihak-pihak menandatangani perjanjian tersebut di hadapan Encik Joseph sebagai Pegawai Pentadbir Sarawak. Selanjutnya, PW2 telah melihat deposit dan sebahagian pembayaran sebanyak RM4,000 dibayar oleh plaintif kepada si mati. Berdasarkan keterangan di atas dan hakikat bahawa defendan tidak pernah mempersoalkan kewujudan perjanjian tersebut dalam pernyataan pembelaan mereka, mahkamah berpuas hati bahawa plaintif dan si mati telah menandatangani perjanjian bertarikh 27 Oktober 1993, iaitu eksh P1, di mana si mati telah menjual kepada plaintif satu ekar tanah daripadaLot 53. Si mati dan juga pentadbir harta pusakanya terikat dengan perjanjian tersebut (lihat perenggan 12, 15–16 & 18).

(2) Berhubung dengan hujahan defendan-defendan bahawa 'adverse inference' harus dibuat diatas kegagalan memanggil Encik Joseph, mahkamah berpendapat bahawa kehadiran Encik Joseph di mahkamah adalah tidak perlu kerana dia hanya akan menyatakan di mahkamah bahawa dia telah bertindak sebagai saksi kepada perjanjian tersebut dan membuktikan perjanjian tersebut. Tetapi mahkamah sudah mempunyai keterangan plaintif dan PW2 mengenai perkara ini. Selanjutnya, perjanjian yang disaksikan oleh Encik Joseph sudah dikemukakan di hadapan mahkamah sebagai eksh P1. Tiada apa lagi yang plaintif perlu buktikan yang memerlukan keterangan Encik Joseph. Atas sebab itu, tiada lagi persoalan untuk membuat apa-apa 'adverse inference' terhadap plaintif kerana tidak memanggil Encik Joseph untuk memberi keterangan (lihat perenggan 17).

(3) Semasa menjual keseluruhan Lot 53 kepada defendan ketiga, si mati tahu bahawa: (a) dia telah menjual satu ekar daripada bahagian tanah tersebut kepada plaintif; (b) bahawa plaintif telah membina rumahnya di bahagian tersebut mengikut terma kontrak; dan (c) bahawa pecah

sempadan telah diluluskan dan selesai dan hanya menunggu penyerahan surat ikatan asal tanah dan catatan pembayaran sewa supaya geran individu boleh diproses. Oleh itu, si mati bukan sahaja melanggar kewajiban kontraknya di bawah eksh P1, dia juga melakukan fraud terhadap plaintif. Atas sebab-sebab ini, plaintif berhak kepada tindakan spesifik perjanjian jual beli antara plaintif dan si mati (lihat perenggan 43–44).

(4) Mengenai hujahan bahawa fraud tidak diplidkan, memandangkan defendan-defendan telah bersetuju agar fraud ditentukan dalam perbicaraan dan defendan-defendan pada setiap masa tidak mempersoalkan tentang kekurangan butiran fraud, itu hanya menunjukkan bahawa mereka tidak diprejudiskan dengan kekurangan butiran fraud (lihat perenggan 71–73 & 75).

(5) Berdasarkan keterangan oleh plaintif yang tidak dicabar bahawa dia telah mula membina rumahnya di Lot 53 pada tahun 1995, defendan ketiga sepatutnya sudah mengetahui seawal tahun 1995 bahawa plaintif adalah pemilik ke atas bahagian tanah tempat kediamannya dibina. Tambahan pula, defendan ketiga yang telah melihat Lot 53 dengan broker yang bernama Sharkawi pasti tahu bahawa rumah yang dilihatnya di atas tanah tersebut diduduki dan dimiliki oleh plaintif. Dengan kematian si mati, dan plaintif masih tidak mengetahui tentang kelulusan pemecahan tanah tersebut dan tidak mengambil tindakan untuk memasukkan kaveat kepentingannya ke atas tanah tersebut, Sharkawi, defendan pertama dan kedua dan defendan ketiga pada bulan Julai 2009 menandatangani memorandum pemindahan yang diserahkan untuk pendaftaran ke Jabatan Tanah dan Ukur. Dengan berbuat demikian, Sharkawi dan defendan-defendan telah bertindak dengan tidak jujur untuk menipu plaintif terhadap haknya ke atas tanah seluas satu ekar di Lot 53. Oleh itu, pemindahan keseluruhan hak dalam Lot 53 oleh defendan pertama dan kedua kepada defendan ketiga adalah salah dan merupakan tindakan fraud terhadap hak, hakmilik dan kepentingan plaintif ke atas tanah tersebut. Oleh yang demikian, defendan ketiga bukanlah pembeli bona fide untuk nilai dan haknya ke atas Lot 53 boleh disangkal (lihat perenggan 80, 88 & 90–91).]

Cases referred to

Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors [2004] 4 MLJ 238, HC (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480, SC (refd)

Ellamah d/o Ellapen v Renganathan s/o Komarasamy & Ors [1988] 3 MLJ 121, HC (refd)

A *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116, FC (refd)
Lean Shing Pek v Anang bin Basang & Ors [2013] 8 MLJ 899, HC (refd)
Lee Kuet Chin v Garai ak Jelian (Tan Kok Sen, intervenor) [2006] 5 MLJ 342, CA (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ
B 294, SC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)
C
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799, FC (refd)

D **Legislation referred to**

Land Code (Cap 81) ss 133, 134

Anne Teo (Lim & Teo Advocates) for the plaintiff.
E *Francis Teron Kadap (Francis Teron Kadap & Co Advocates) for the defendant.*

Supang Lian J:

INTRODUCTION

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[1] The proceeding in this case arose from the claim of the plaintiff against the defendants seeking, among others, the transfer to himself of an area of one acre of land which is within Lot 53, Block 18 Bukar-Sadong Land District and a declaration that the transfer of the entire rights and interest in Lot 53 by the
G first and second defendants to the third defendant was wrongful, improper and an act of fraud against the plaintiff.

[2] The defendants disputed the plaintiff's claims. The trial of the action took six days. Four witnesses testified for the plaintiff namely, Mr Jimmy Choo
H Lim Hian (PW1) ('the plaintiff'), Mr Bong Kuat Khiong (PW2), Mr David Kon Siew Fah (PW3) and Mdm Nur Iman Najwa Abdullah (PW4). The defendants called five witnesses namely, Mr Kon Sunny (DW1) ('the third defendant'), Mdm Chong Siew Khim (DW2) ('the second defendant'), Mr Chong Kuet Khiong (DW3), Mdm Liew Nyit Fah (DW4) ('the first
I defendant') and Mr Bernard Philip Lamat (DW5).

[3] After the conclusion of trial, I gave judgment for the plaintiff and ordered as follows:

(a) a declaration that the plaintiff is equitably and legally entitled to the one acre of land in Lot 53;

(b) a declaration that the transfer of Lot 53 by the first and second defendants in their capacity as administrators of the estate of Chong Ah Jin to the third defendant was wrongful and an act of fraud against the plaintiff's right and interest in the one acre of land in Lot 53;

(c) specific performance of the agreement dated 27 October 1993 and the first and second defendants ordered to complete the agreement;

(d) the third defendant is to complete the subdivision of Lot 53 in accordance with the approval by Lands and Surveys Department of Samarahan Division;

(e) the third defendant is to transfer to the plaintiff the one acre of land now known as Lot 130 to the plaintiff upon payment by the plaintiff to the first and second defendants the balance of the purchase price under the agreement; and

(f) costs of the action to the plaintiff in the sum of RM15,000.

THE PLAINTIFF'S CASE

[4] Chong Ah Jin now deceased, was the registered owner of a piece of land 2.948 hectares in size and originally described as Lot 20, Block 18, Bukar-Sadong Land District. It is now known as Lot 53 and hereinafter, referred to as such. Hereinafter Chong Ah Jin will be referred to as 'Chong' or 'deceased'.

[5] The plaintiff claimed that on 27 October 1993, Chong had sold to him an undivided portion of Lot 53 approximately an acre in size. Chong had agreed to apply for the subdivision of the land and thereafter to transfer to the plaintiff the portion that he had bought. The subdivision of the land was approved on 18 July 2000, but Chong did not make this known to the plaintiff. Instead, on 6 July 2004 Chong, also unknown to the plaintiff, sold the whole of Lot 53 to Kon Sunny, the third defendant. Before the land could be transferred to the third defendant, Chong passed away on 10 August 2005. But eventually, Lot 53 in its entirety was transferred to the third defendant by Liew Nyit Fah (the first defendant), and Chong Siew Khim (the second defendant), who are the administrators of the estate of the deceased, on 28 December 2009.

[6] Thus the plaintiff brought this action against the defendants alleging that the transfer of Lot 53 by the first and second defendants to the third defendant was an act of fraud against the plaintiff's rights and interest in the land. The plaintiff claimed specific performance against the first and second defendants and an order against the third defendant to transfer to him the one acre of

Lot 53 that he had bought and which had been approved for subdivision.

THE DEFENCE

[7] The first defendant was the wife of the late Chong whereas the second defendant was his daughter. They had obtained the letters of administration for the estate of the deceased on 16 August 2005. They stated that they only became aware of the deceased's ownership of Lot 53 after they had obtained the letters of administration. They were unaware of the alleged sale of one acre of Lot 53 to the plaintiff. Neither were they aware of the sale of the land to the third defendant until they were shown the sale and purchase agreement dated 6 July 2004 signed by the deceased and the third defendant. As such, they ought not to be blamed for completing the transaction and effecting the transfer of the land to the third defendant on 28 December 2009.

[8] As for the third defendant, he said that it was one Mr Sharkawi, also now deceased, that had introduced Lot 53 to him for sale at the agreed price of RM144,000. Throughout the transaction, he had never met Chong. As the title search showed that the land was unencumbered, he signed the sale and purchase agreement on 6 July 2004 and paid a deposit of RM14,000. The memorandum of transfer was signed on 21 July 2009 and registered on 28 December 2009. He denied being a distant relative of the plaintiff or that he knew the plaintiff personally. Also, he was neither aware of nor informed by the plaintiff of the sale of the one acre of Lot 53 to himself. He therefore claimed to be a bona fide purchaser for value possessing indefeasible title.

ISSUES FOR DETERMINATION

[9] The parties in the statement of issues to be tried (Bundle E) have between them stated 13 issues for determination. Most of the issues are overlapping and can be condensed to four as follows:

(a) whether the plaintiff had entered into an agreement with the late Chong for the purchase of one acre of Lot 53 from Chong;

(b) whether the plaintiff being a purchaser under the agreement had acquired an interest in law and in equity in Lot 53;

(c) whether the transfer of the entire rights and interest in Lot 53 by the first and second defendants to the third defendant was wrongful and an act of fraud against the plaintiff's rights, title and interest in the land;

(d) whether the third defendant was a bona fide purchaser for value/whether the third defendant was a party to fraud thereby defeating his indefeasibility; and

(e) whether the plaintiff was entitled to specific performance of the sale and purchase agreement or alternatively other equitable reliefs.

[10] I will proceed to deal with the issues although not necessarily in the order set out above.

First issue: Whether the plaintiff had bought one acre of Lot 53 from Chong?

[11] The evidence on this is as follows. Back in 1993, the plaintiff (PW1), was rendered homeless because his sister's land which he had occupied, had been acquired by the government to build the major road from Serian to Tebedu. Since then he had moved house five times and he wanted to build his own. Lot 53 (which was lot 20 then) owned by the late Chong was very near his sister's original land and it was big. It had no access to the road though. He went looking for Chong who agreed to sell to him a portion of Lot 53 consisting of one acre. They agreed on the price of RM6,500 for the one acre of land.

[12] As was the custom in a small town as Serian, they went to the district office to get assistance in drafting the sale and purchase agreement. The land clerk who attended to them was Bong Kuat Khiong (PW2). He assisted them to prepare the sale and purchase agreement based on their terms and instructions. The plaintiff and PW2 had both identified the document at p 1 of Bundle C (tendered and marked as exh P1) as the agreement that PW2 had prepared for the plaintiff and Chong based on their instructions. It is dated 27 October 1993.

[13] The salient terms were:

(a) the plaintiff shall pay to Chong RM4,000 as deposit and part payment of the purchase price at the time of signing;

(b) Chong shall be responsible to apply for subdivision of Lot 53 in two portions and individual title issued for the one acre;

(c) the balance of the purchase price of RM2,500 shall be paid after the subdivision of Lot 53 and upon execution of the memorandum of transfer respecting the land; and

(d) upon signing of the agreement, the plaintiff was at liberty to develop and build on the land.

[14] At the time of the preparation of the document the plaintiff and Chong had also agreed on the location and the rough boundary of the one acre agreed to be sold to the plaintiff. PW2 made a copy of the original land title that Chong had brought with him and helped the parties to draw a straight line on the land diagram to indicate the one acre portion of land the parties meant to

transact and deal. Both parties then signed on the copy of the land title. It was tendered and marked exh P2(a) and (b).

[15] After PW2 had prepared the agreement, he explained its contents to the plaintiff and the deceased in the Hakka dialect. When both parties had expressed agreement to the content, PW2 brought them before the Sarawak Administrative Officer ('SAO') Mr Joseph Jinam Lidok who witnessed and attested the signing of the agreement by both parties. PW2 gave evidence that he saw the parties signing the agreement before Mr Joseph Lidok even though it was not his name that was stated as a witness to the parties' signatures at the bottom of exh P1.

[16] In addition, PW2 gave unrefuted evidence that he had seen the deposit and part-payment of RM4,000 being paid by the plaintiff (as buyer) to the deceased (as seller).

[17] Mr Francis Teron of learned counsel for the defendants argued that Mr Joseph Lidok was a material witness and should have been called to testify. Adverse inference should be drawn against the plaintiff for the failure to do so. I respectfully disagree. In my view Mr Joseph Jinam's presence in court was unnecessary because all he would be saying in court was that he had acted as a witness to the signing of the agreement and attested the agreement. But we already had the evidence of PW1 and PW2 on this. Furthermore, the agreement as attested by Mr Joseph Jinam was before the court as exh P1. There was nothing else for the plaintiff to prove that needed Mr Joseph Jinam's evidence. For that reason there was no question of drawing any adverse inference against the plaintiff for not calling him to testify.

[18] Based on the foregoing evidence and coupled with the fact that the defendants in fact had never disputed the existence of the agreement in their statement of defence, I was satisfied that the plaintiff and the deceased Chong Ah Jin had entered into the agreement dated 27 October 1993, which is exh P1, whereby the deceased had sold to the plaintiff 1 acre of Lot 53. The deceased was bound by this agreement and so were the administrators of his estate.

Second issue: Whether the plaintiff as a purchaser under the agreement had acquired an interest in law and in equity in Lot 53?

Third issue: Whether the plaintiff was entitled to specific performance of the agreement or alternatively other equitable reliefs?

[19] I will deal with these two issues together as they are inter-related.

[20] The plaintiff (PW1) gave evidence that after he bought the one acre portion of Lot 53, he cleared part of it and then started the construction of a single-storey house measuring 48ft x 48ft in 1995. This was in accordance with the terms of the agreement. It took him two years to complete construction. The photographs of the house in its present state were produced at pp 3–5 of Bundle C1 (exh P3 (A–C)). The plaintiff had received the assessment rates on the house for the first half of 2016 from the Serian District Council and he had paid for it. The bill was produced in Bundle C at p 6 (marked exh P6).

[21] To ensure that his house would be standing within the boundaries of his one acre portion, he asked Chong to go over to the land before he started building. Chong had gone to the land to inspect the site and was satisfied that the construction of the house would not disturb the boundary between their respective portions.

[22] The plaintiff assumed that Chong had arranged for the land to be surveyed and subdivided as he brought a private land surveyor with him to the plaintiff's house. The plaintiff followed them as they inspected the boundary between his portion and Chong's portion which was in a straight line as indicated in exh P2(a) and (b). Afterwards, whenever he met Chong in Serian town, he would ask him on the progress of the subdivision. Chong's answers were always that it was not yet completed.

[23] Around mid-2013, the plaintiff heard from his wife that her friends had told her that his land had been sold and transferred to Kon Sunny, the third defendant. After making enquiries at the Land Office in Samarahan, he was informed that the whole of Lot 53 had been transferred to Kon Sunny. He was also informed that the subdivision had been approved and that his portion was given a lot No 130 and Chong Ah Jin's portion Lot 131.

[24] To protect his interest in the one acre portion of land, the plaintiff had instructed his lawyers to lodge a caveat on Lot 53 on 10 July 2013.

[25] Subsequently, on 10 September 2013 the plaintiff received a letter from the Lands and Surveys Department, Samarahan Division (produced at p 10, Bundle B (Part B)) which was signed by Nur Iman Najwa Abdullah (PW4) informing him that upon completion of the subdivision survey of Lot 53 into two lots, the applicant (Chong) had been advised to comply with the necessary subdivision process since 25 August 2003. However, Chong did not respond. The letter went on to state that the land had been transferred to Kon Sunny in 2009.

[26] PW4, an assistant land officer at the Lands and Surveys Department, Samarahan Divisional office, gave evidence that on 24 February 1999, Chong

through his surveyor Juruukur Tanah Masa had submitted the application for subdivision of Lot 53, Block 18 Bukar-Sadong Land District at the Land office. The proposed lay out plan was included in the application which was exhibited at p 3 of Bundle B. Chong's application was approved in July 2000 in accordance with the approved plan as attached. The approval letter dated 6 November 2000 from the Lands and Surveys, Samarahan Divisional office to Chong was produced in Bundle B at p 4.

[27] Thereafter, as evidenced by the letter of 18 January 2001 (at p 7, Bundle B), Chong submitted the subdivision plan to the land office through his newly appointed surveyor Boraini Surveys Sdn Bhd.

[28] By a letter dated 25 August 2003 (at p 8, Bundle B) and signed by PW4, the land office informed Boraini Surveys that the subdivision had been duly completed. The land office requested the landowner to surrender the parent title deed and the rent payment booklet for replacement. There was no response from Chong. It is to be noted that according to Kon Sunny, the third defendant, on 6 July 2004, which was nearly a year later, Chong had entered into an agreement to sell Lot 53 to him.

[29] PW4 said that the land office wrote again to Boraini Survey on 19 July 2006 (letter at p 9, Bundle B) to inform Chong that the subdivision was duly completed. The landowner was again requested to surrender the parent title deed and rent payment booklet. However, this was not done. It will also be recalled that Chong had passed away on 10 August 2005 which was a year before the land office issued this second letter.

[30] On 21 November 2012, and this is an agreed fact between the parties, the same Samarahan Land Office had informed the third defendant that Chong had applied for subdivision of Lot 53 and that it had been approved. The letter is at p 19, Bundle B. In the same letter, Kon Sunny was asked to advise the land office if he was still interested in proceeding with the subdivision or otherwise.

[31] On 24 July 2013 the third defendant, wrote to the land office to cancel the subdivision. In reply, the land office informed him he needed to obtain the plaintiff's consent to cancel the subdivision as the latter had lodged a caveat.

THE PLAINTIFF'S ARGUMENTS

[32] Ms Ann Teo, learned counsel for the plaintiff, argued that as the existence as well as the fact that Chong had entered into the agreement to sell the one acre of the land to the plaintiff had been proven, such contract was binding on Chong (now deceased) and the administrators of his estate. Being

a purchaser under the agreement, the plaintiff had acquired and established a beneficial interest over the one acre portion of land which would be perfected only after the subdivision of the land into two portions and individual document of title issued in respect of that one acre.

THE DEFENDANTS' ARGUMENTS

[33] Mr Francis Teron argued that notwithstanding exh P1, the late Chong had not divested his beneficiary rights to the plaintiff. Neither had the plaintiff acquired beneficial rights over the one acre of land. This is because:

(a) the plaintiff had only paid RM4,000 out of the RM6,000 purchase price;

(b) the plaintiff agreed that the sale was neither perfected nor completed; and

(c) there was no evidence that the plaintiff and Chong had ever executed any memorandum of transfer to secure the transaction.

[34] In support of this argument, Counsel referred to the case of *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 at p 118B where the Federal Court stated that it is only when full payment had been made that the purchaser is deemed to be beneficiary of the land and the vendor stands as a bare trustee in favour of the purchaser. Similarly, the Federal Court in *Lee Kuet Chin v Garai ak Jelian (Tan Kok Sen, intervenor)* [2006] 5 MLJ 342 at p 345 held that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the purchasers, are bare trustees for the appellants of the land.

[35] Counsel also referred to *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 at p 305 (SC); and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 which held that the vendor is regarded as having divested himself of all beneficiary interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

[36] In the following cases, counsel said, it was held that it is only upon the payment of the full purchase price by the buyer to the seller that the buyer obtains a beneficial interest in the property and the owner becomes a bare trustee for the buyer: see *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 (SC); *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 (FC) and *Lean Shing Pek v Anang bin Basang & Ors* [2013] 8 MLJ 899 at p 914 (HC).

[37] Based on the authorities above, learned counsel submitted that Chong could not be treated as a bare trustee for the plaintiff. Neither was he a beneficial owner of the one acre of land. As such, the plaintiff's action against the first and second defendants in their capacity as administrators of the estate of the late Chong ought to be dismissed.

THIS COURT'S DECISION

[38] If I may start by saying that from what I understand of the doctrine of bare trustee, it is only relevant where competing interests are at stake as for instance when the landowner has sold the same piece of land twice. In our present case, it will come into play as between the competing interests of the plaintiff and the third defendant. I will deal with that issue later. But as between the plaintiff and Chong, the landowner (now represented by the administrators of the estate), the concept of bare trustee has no application.

[39] The issue between the plaintiff and the first and second defendants as administrators of the estate of Chong is whether Chong had failed to perform his obligations under the 1993 agreement and was therefore in breach of it. And if he was in breach, whether the plaintiff was entitled to an order of specific performance or in lieu of that other reliefs.

[40] It has to be stated up front that since the agreement exh P1 and the fact that Chong had entered into the agreement to sell the one acre of land to the plaintiff had been proven, such contract was binding on Chong and now on the administrators of his estate. Under the terms of the agreement, Chong was bound to apply for subdivision and upon approval and completion of subdivision, he was bound to surrender the parent title deed and rent payment booklet to enable the land office to issue the individual documents of title. Thus, the nature of the interest of the plaintiff in the land consisted of his contractual rights under the terms of the 1993 agreement.

[41] To my mind, in making the application for subdivision and obtaining its approval, Chong, the landowner, was in fact carrying out the terms of the agreement. He therefore had part performed the terms of the agreement. Not only that, Chong went further to complete the process by submitting the subdivision plan through his newly appointed surveyor Boraini Surveys Sdn Bhd on 18 January 2001.

[42] As PW4 had testified, the subdivision had been completed by the land office and Chong was informed of this through Boraini Surveys, his appointed surveyor, first by the letter of 25 August 2003. Chong was even requested to surrender the parent title deed and rent payment booklet. Unfortunately,

instead of going ahead with obtaining the individual titles which was his contractual obligation to do so, he sold Lot 53 to Kon Sunny, the third defendant.

[43] In selling Lot 53 in its entirety to Kon Sunny, the late Chong very well knew that:

(a) he had sold the one acre portion of it to the plaintiff;

(b) that the plaintiff had built his house on that portion in accordance with the terms of the contract; and

(c) that the subdivision had been approved and completed and was only awaiting his surrender of the parent title deed and the rent payment booklet so that individual titles could be processed.

Thus, the late Chong was not only in breach of his contractual obligations under the 1993 agreement, he had also committed an act of fraud against the plaintiff.

[44] For these reasons, the plaintiff was entitled to specific performance of the sale and purchase agreement between him and Chong. But of course, it is trite that specific performance will not be ordered if the landowner had sold or divested himself of his interest in the land to a third party who is a bona fide purchaser for value and not party to fraud that would defeat his indefeasibility of title.

[45] This brings us to the next issues to be determined.

Fourth issue: Whether the transfer of the entire rights and interest in Lot 53 by the first and second defendants to the third defendant was wrongful and an act of fraud against the plaintiff's rights, title and interest in the land?

Fifth issue: Whether the third defendant was a bona fide purchaser for value/whether the third defendant was a party to fraud thereby defeating his indefeasibility of title?

[46] These are overlapping issues and will be dealt with together.

[47] As stated earlier, it is common ground that Lot 53 was transferred by the first and second defendants to the third defendant on 21 July 2009 via the memorandum of transfer produced at p 2, Bundle B. The question arising is whether the third defendant is a bona fide purchaser for value or was he a party to fraud such that indefeasibility of his interest is defeated.

GENERAL PRINCIPLES

[48] It is well settled that only an act of fraud can defeat indefeasibility of title under the Sarawak Land Code: see s 134 of the Sarawak Land Code and *Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors* [2004] 4 MLJ 238. Whether or not there is fraud is a question of fact to be determined in the light of the facts and circumstances of each case. With regard the standard of proof required of the plaintiff, the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 stated that for fraud in civil claims, the standard of proof is on balance of probabilities.

[49] One also needs to keep in mind the provisions of s 133 of the Sarawak Land Code which reads:

> (1) No person, whether or not he has become registered as the proprietor of any interest, who contracts or deals with, or takes a transfer from, a registered proprietor or with or from a person who is entitled to be registered as proprietor shall, except in the case of fraud, be concerned to ascertain the circumstances under which such proprietor, or any previous proprietor, was registered, or to see to the application of the purchase money, or be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding.
>
> (2) The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud for the purpose of this section.

EVIDENCE FOR THE PLAINTIFF

[50] The plaintiff had been a farmer and had lived in the area of Kampong Tebakang Dayak, Mongkos, Serian all his life. He is now 80 years old. He said that Kon Sunny ('DW1'), the third defendant, is his second cousin as their grandmothers were sisters. DW1 called him 'Ah Ko' which means 'Abang' or brother in Hakka dialect and DW1's father is Kon Ted Foot.

[51] He said that DW1 had never asked him about his land or to buy it. But in year 2000 a broker by the name of Sharkawi, also known as Choo Boon Hin, had approached him and tried to persuade him to sell his one acre land and house and move to Kuching. He told Sharkawi he was not interested as he had moved many times in his younger days and now he has a place of his own. Sharkawi had also been to his house and land and very well knew that he was living there and occupying part of Lot 53.

[52] He said that DW1 would be lying to this court if he claimed he did not know him or that he did not know that he had an interest in Lot 53. In the year 2000 DW1 had visited him at his house on the one acre land to look for herbs

as medicine for his father who was very sick, vomiting and haemorrhaging blood. DW1 had even given him his business card which bears his name. It was produced as exh P5 (at Bundle C, p 7). DW1 had also given him RM20 for his trouble and anticipated expense.

[53] Other than that, Kon Sunny's fish pond and oil palm nursery was about a kilometre away down the road from plaintiff's house and Kon Sunny often spent time at this place. When the plaintiff was constructing his house on his one acre land, Kon Sunny had given him 60 pieces of timber to build the wooden roof truss of his new house. At that time, the land on which the plaintiff was staying as well as Kon Sunny's farmhouse was acquired by the government when the main road from Serian to Tebedu was being built. Kon Sunny asked him to take the timber from the dismantled chicken coop on his land to build the roof truss of the plaintiff's new house.

[54] Also, after he had completed constructing his house on the one acre land, Kon Sunny came over and looked around. He asked the plaintiff why the drain was not yet constructed and went off.

[55] The plaintiff did not lodge any caveat on the property after he bought the one acre as he had never heard of it. Moreover, he thought that his interest was secure as he had signed the sale and purchase agreement at the district office.

[56] David Kon Jiew Fah (PW3) is a pensioner who comes from Tebakang. He and the plaintiff have known each other from young and they are neighbours. He called the plaintiff by his nick name, 'Che Che'. He also knew Kon Sunny, the third defendant, as they are second cousins. When they bumped into each other, they greet each other. He said that Kon Sunny's family were originally from Tebakang but had moved to Serian in the 60's when Kon Sunny was a little boy.

[57] Around 2013, the third defendant has asked him to convey a message to the plaintiff that the land he is occupying now belonged to him. PW3 did not want to tell the plaintiff personally and he wondered how could it be. This is because he was the person that had advised the plaintiff to go to the district office to get the sale and purchase agreement on his one acre land prepared and signed. He had been to the plaintiff's house many times. The house is visible from the road leading to Tebakang Bazaar and the driveway is about 100ft from the road.

[58] He knew that the third defendant was a businessman and ran an oil palm seedling nursery previously at Tebakang but had since moved to Serian. Before that, the third defendant had a chicken farm along the old

Tebakang-Serian Road about 1km from Lot 53. When asked to explain how Kon Sunny would have known that he knew Jimmy Choo the plaintiff, he said that there are not many Chinese families in Tebakang, it is a small community and they all knew each other. Kon Sunny also knew that he lived not very far away from Jimmy Choo.

[59] He said that it could not be true that Kon Sunny would not have been aware of the plaintiff's house at Lot 53 when he bought if from Chong in 2004. Kon Sunny is familiar with the Tebakang area as he had relatives and conducted business there. Furthermore, Jimmy Choo's house is visible from the roadside and it is the only house there. His own house is up the road from Jimmy Choo's place and he passed by the area very often.

EVIDENCE FOR THE DEFENDANTS

[60] Kon Sunny ('DW1') gave evidence that in early July 2004, Sharkawi introduced to him the piece of land known as Lot 20 back then but now known as Lot 53. Sharkawi showed him the old title (pp 9–10 Bundle A) and also the locality plan (at p 3 Bundle C). DW1 knew more or less the location of the land judging by the locality plan. He also visited Lot 53 briefly and being satisfied with it, negotiated with the owner Chong Ah Jin through Mr Sharkawi on the price. They agreed at the price of RM144,000.

[61] They then engaged a solicitor Mr Bernard Phillip Lanat ('DW5') to handle the transaction for them. DW5 testified that he had obtained an extract of the title of Lot 53 from the Samarahan Lands and Surveys Department, and he found that the title was clean there being no restrictions whatsoever and no caveat lodged. Based on DW5's advice that the title was clean, DW1 had entered into the sale and purchase agreement dated 6 July 2004 (at pp 5–13, Bundle C) with Chong. Upon signing the agreement, DW1 paid RM14,000 in cash being deposit or part payment through Mr Sharkawi. However, the land was not transferred to him until five years later in July 2009.

[62] DW1 stated that with the demise of Chong on 10 August 2005, the first and second defendants came forward to complete the transaction. Notwithstanding the terms of payment provided in the sale and purchase agreement, the first and second defendants and DW1 had agreed to a slight amendment to be made thereto in that the first and second defendants agreed to effect the transfer of Lot 53 to DW1 upon payment of RM30,000 and the balance to be paid in stages. As such, DW1 on 21 July 2009 paid another sum of RM16,000 to make up the RM30,000 as further part payment of the purchase price to the first and second defendants through Sharkawi. The latter passed away a few years later.

[63] In return for the payment of RM30,000 and pursuant to the parties' further agreement, Lot 53 was then transferred to DW1 via the memorandum of transfer dated 21 July 2009 (at p 2, Bundle B). Thereafter, DW3 said he had been paying the balance of the purchase price to the first and second defendants in stages. He had since paid the balance of the sum of RM114,000 in full to the first and second defendants. DW1 stated that all payments were made in cash to the first and second defendants upon their request based purely on trust and confidence.

[64] DW1 claimed that at the time he decided to buy Lot 53 from Chong Ah Jin, he was not aware of the plaintiff's existence on, nor the plaintiff's house or rights over Lot 53. When he visited Lot 53 with Sharkawi at the time the land was introduced to him, he did notice a house located at the vicinity of the site that the plaintiff now claimed to be his and seated on Lot 53. However, the same was not brought to his attention and he did not know it belonged to the plaintiff. He knew though that the plaintiff or his family did own a house at the vicinity of the area many years back by the road side of Jalan Tebakang, but it was located on the opposite side of the plaintiff's current house.

[65] He denied that he is a distant relative of the plaintiff or that he knew him personally. He now knows that plaintiff is one of the residents in that area or within the neighbourhood. He had been to a house built in the vicinity of Lot 53 during one of the fruit seasons many years back before he bought the same, but he was walking around its compound to buy fruits from sellers at the road side. He never came to know that the house belonged to the plaintiff or that he bought a certain portion of Lot 53.

THE DEFENDANTS' ARGUMENTS

[66] Learned counsel for the defendants contended that contrary to the requirements of O 18 r 19 of the Rules of Court 2012, no facts showing fraud and no particulars of fraud were specifically pleaded against the defendants. In *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799 at para [26] the Federal Court held that when fraud is pleaded, the particulars must be pleaded and mere general allegations of fraud are insufficient to constitute a pleaded case of fraud.

[67] Furthermore, the plaintiff had failed to lead any evidence to show that the defendants had defrauded him. There is no evidence to show that the instruments namely the old land title of Lot 20 (Bundle A, pp 9–10); the new land title of Lot 20 now known as Lot 53 (Bundle A, p 11) or the memorandum of transfer (Bundle B, p 2) were procured by means of fraud.

[68] In addition, the third defendant is a bona fide purchaser for value. He paid RM30,000 and thereafter had settled the balance of RM114,000 with the first and second defendants. DW5 gave evidence that he had carried out the usual required procedures in conveyancing protocol on land transfer by doing land search and getting extract of the title of the land and found nothing suspicious. There was no caveat lodged and no restriction on transfers. Thus there was no evidence that the third defendant was a careless or negligent purchaser.

[69] Learned counsel for the plaintiff had suggested that a locality map search would have shown that there was an application for subdivision but fell short of saying that such search was a mandatory requirement or at least part of standard protocol a conveyancing lawyer would undertake. Thus, the third defendant had proven on balance of probability that he had paid good value for the land and had done through DW5 what needed to be done to verify the status of the land with the land office.

[70] In any event, as provided under s 133 of the Code, the mere fact that the third defendant had come to know of the alleged transactions between the plaintiff and the late Chong did not make his title defeasible in the absence of any act of fraud committed in procuring the title to Lot 53.

THIS COURT'S DECISION

[71] On the contention that fraud was not pleaded, firstly, I took note that the defendants had agreed for fraud to be one of the issues to be tried: see Bundle E where one of the issues stated under item 1 is, 'Whether or not the 1st and 2nd Defendants and/or the 3rd Defendant is a party or privy to fraud thereby defeating the 3rd Defendant's alleged indefeasibility of title over the said Land'. In my view, given that the defendants had, during pre-trial case management, agreed for fraud to be determined, they are precluded, nay, estopped from asserting to the contrary. Moreover, the plaintiff had gone to trial on the agreement of the defendants that fraud will be an issue for determination. To allow the defendants to renege on their agreement would be a travesty of justice.

[72] Secondly, at no time during the pleadings stage or at the trial of this matter did the defendants raised objection that there was a failure to plead the particulars of fraud.

[73] Third, the defendants could not be said to have been caught by surprise that the plaintiff was raising the issue of fraud or dishonesty with the object of defeating the indefeasibility of title. The statement of claim may not have gone into the particulars of the fraud but the plaintiff did plead or allude to facts that

pointed to fraud, in particular, the knowledge of the third defendant of the plaintiff's interest in the land at the time of the purchase as well as at the time of the execution of the memorandum of transfer: see paras 8–10 of the statement of claim.

[74] In *Ellamah d/o Ellapen v Renganathan s/o Komarasamy & Ors* [1988] 3 MLJ 121 at p 123 Siti Normah Yaakob J said:

> The only particulars appearing in the statement of claim are those found in para 6 where there is an allegation that the defendants employed the services of third parties to force the plaintiff to transfer the property to them. Although the pleadings are wanting in that they do not set out other particulars of fraud, the evidence, however clearly shows that other instances of fraud have occurred but since no objection was raised by ... counsel for the defendants, in the course of the trial of the lack of particulars in the pleadings, I can only assume that his clients have not been in any way prejudiced by the lack of particulars. Be that as it may, since there is overwhelming evidence that the transfer was not executed with the plaintiff's consent as she was not made aware that she was transferring her property to the defendants, an intention that runs contrary to that expressed by her in P1 and bearing in mind the whole circumstances of this case, it is my considered opinion that the insufficient particulars should not be a bar to the plaintiff's claim.

[75] Likewise, since the defendants in the present case agreed for fraud to be determined at the trial and did not at any time take objection to there being lack of particulars of fraud, it could only mean that they were not prejudiced by the lack of particulars.

[76] I move on to the substantive issue of fraud. From the evidence of the conduct of the third defendant and the circumstances under which the sale and purchase agreement was entered into between Chong and the third defendant, I was persuaded that the latter had acted dishonestly to defraud the plaintiff of his interest in his one acre of land in Lot 53.

[77] The third defendant's denials that he knew the plaintiff personally, or that they are related or that he knew that the plaintiff had a house on Lot 53 and had visited the plaintiff are in my opinion, bare denials, incredulous and unworthy of belief.

[78] The third defendant had never challenged the specific and clear assertions of the plaintiff that they knew each other, that they are second cousins because their grandmothers were sisters and that the third defendant called the plaintiff 'Ah Ko' in Hakka which means 'Abang' or brother. To my mind, the plaintiff's evidence on this was not inherently incredible because after all they share the same sir name of 'Kon'. David Kon Jiew Fah (PW3), who is also the second cousin of the third defendant and who I regarded as an

A independent witness, confirmed that he, the plaintiff and the third defendant were all originally from Tebakang and known to each other. The plaintiff and PW3 had remained in Tebakang whereas the third defendant and his family had moved to Serian. It is also noteworthy that the third defendant had admitted that he knew that the plaintiff or his family owned a house at the B vicinity of Lot 53 many years back by the side of Jalan Tebakang. And crucially, the third defendant himself had approached PW3 to convey the message to the plaintiff that he had bought the land he occupied on Lot 53 and it now belonged to him. On this occasion, the third defendant had referred to the plaintiff as 'Che Che' which is his nick name. This meant that not only were the C three of them familiar and known to each other, the third defendant as well knew that the plaintiff was occupying a portion of Lot 53.

[79] The third defendant had also given bare denials of the plaintiff's clear D and specific evidence of an incident in the year 2000 when the third defendant had visited him at his house on the one acre land at Lot 53 to look for herbal medicine for his ailing father. The third defendant had even left his business card (P5) and given the third defendant RM20 for his trouble and anticipated expenses. The third defendant could not give a satisfactory explanation as to E how his business card came to be in the possession of the plaintiff. It is noteworthy that this visit to the plaintiff's house by the third defendant in 2000 was prior to Sharkawi approaching him in the year 2004 to sell Lot 53. Thus, it was incomprehensible that the third defendant had claimed in court that when Sharkawi approached him in 2004, he did not know the plaintiff F had a house on Lot 53.

[80] The third defendant had also not been able to cast doubt on the plaintiff's evidence that he had in fact given the plaintiff 60 pieces of timber to build the roof truss of his house. There was nothing inherently improbable G about the plaintiff's evidence on this as he had given unrefuted evidence that both the third defendant's land where he had a chicken farm and the land on which the plaintiff was staying at that time were acquired by the government to build the Serian-Tebedu Road. The timber pieces were from the chicken coup on the third defendant's land that had to be demolished. PW3's evidence that H the third defendant used to own a chicken farm along the old Tebakang-Serian Road about 1km from Lot 53 also lent credence to the evidence of the plaintiff. Given the unchallenged evidence of the plaintiff that he had started constructing his house on Lot 53 in the year 1995, the third defendant would have known as early as 1995 that the plaintiff owned the portion of land where I his house stood.

[81] The third defendant had testified that he had inspected or viewed the land that he had intended to purchase together with Sharkawi, the broker. This would be in the year 2004. They had walked from its southern end at the spot

he had marked 'S' on exh D2 (p 3, Bundle C) from the side of a road towards the junction of the main road where he saw 'a house and paddy huts at the end of the junction'. When shown the photographs of the plaintiff's house and asked if that was the house that he saw, he became evasive and said he was not sure as he was quite far away. When asked if he had seen a road leading to the house, he said he saw a road but was not sure if it was tarred or a pebble road. In answer to a question from the court if there were any houses between the Northern boundary of Lot 53 and the main road, the third defendant said that the only house he saw was at the spot he marked 'H' on exh D2 which was on his left. But then, he went on to admit that years before he bought Lot 53, during the fruit season, he had been to a house built in the vicinity of Lot 53 and had gone around its compound to buy fruit.

[82] Based on the evidence of the third defendant, on his visit to the land with Sharkawi, he had seen a house situated 'in the vicinity' of Lot 53 and that it was the only house there. He then became evasive when asked if it was the plaintiff's house. Obviously, the third defendant was not telling the truth when he said he was not sure if it was the plaintiff's house that he saw because, as had been earlier determined, he had visited the plaintiff on his one acre land on Lot 53 on a few occasions — when construction of the house was completed in 1997 and in the year 2000 when he went to look for herbal medicine for his father. Also, it was established that his knowledge of the plaintiff's occupation of the land goes back to 1995 as he had provided some timber in the construction of the roof truss of the house.

[83] PW3 also gave unchallenged evidence that the third defendant was very familiar with the area of Tebakang having family as well as conducting business there. He also said that the plaintiff's house is the only house in the vicinity of Lot 53 and it is visible from the roadside. It is remarkable in my view that the third defendant, as an intended buyer, despite having seen the house which was to his left in the vicinity of Lot 53 when he visited with Sharkawi, had never asked the latter who lived in that house or to whom it belonged: see NOP, pp 115–116 ans 503; ans 2 to Q4 of WSDW. Surely, no purchaser would like to see squatters on the land that one is about to purchase. This confirmed that he in fact already knew at the time of his visit with Sharkawi to whom the house belonged.

[84] In addition, the old title of Lot 53 (at pp 9–10 Bundle A) as well as the locality plan (Bundle C, p 3) had been shown to the third defendant by Sharkawi before they went to view the land. As the third defendant himself had testified, he thus knew more or less the location of the land. This confirmed PW3's evidence that the third defendant has knowledge of the geography of the area. Moreover, the third defendant confirmed under cross-examination that he is the owner of about 16 plots of agricultural land. He is therefore no

stranger to land purchases and the legal procedures that go along with it. In my opinion, he could not have been uncertain of the boundaries of Lot 53 when he viewed it with Sharkawi. It would have been highly improbable that he would have not noticed the plaintiff's house which measured 48 x 48ft and with a 100ft long driveway from the roadside located within the boundaries of Lot 53.

[85] The Federal Court in *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 held that knowledge of a prior unregistered interest may not amount to fraud and the plaintiff needs to prove that there is a dishonest act to wilfully and consciously deprive the plaintiff of his right.

[86] In our present case, the third defendant had demonstrably told lies in court when he claimed that the plaintiff was not known to him and that he did not know that the plaintiff occupied the house on Lot 53 before Sharkawi brought him to view Lot 53 in 2004. I was convinced that the third defendant had gone to such length to deny knowledge of the interest of the plaintiff to cover up his wilful act in concert with Sharkawi and Chong Ah Jin to deprive the plaintiff of his right in his land.

[87] It will be recalled that Chong's application for subdivision of Lot 53 that he had submitted in accordance with the terms of the agreement of 27 October 1993 between him and the plaintiff was approved in July 2000 and the letter of approval issued to Chong on 6 November 2000. Chong did not inform the plaintiff of this. Instead we had the plaintiff's unchallenged evidence that in the same year of 2000, Sharkawi, the broker, had approached him and tried to persuade him to sell his one acre land and house. This means that Sharkawi at that time knew of the plaintiff's interest in the land. Indeed, as plaintiff had testified, Sharkawi had been to his house at Lot 53 and very well knew that he was living there. Since Sharkawi was Chong's agent, it is to be inferred that he was acting at the behest of Chong and with his knowledge.

[88] On 25 August 2003, the land office informed Chong that the subdivision was duly completed. But then we see Sharkawi, as his agent, approaching the third defendant in early July 2004 to sell to him the whole of Lot 53 (including the plaintiff's lot). The third defendant on his part had viewed Lot 53 with Sharkawi and as established earlier, must have known that the house that he saw there was occupied and belonged to the plaintiff. Despite knowing that the plaintiff's house was on Lot 53, the third defendant went ahead to negotiate with the landowner through his agent Sharkawi to buy the whole of Lot 53 at the price of RM144,000. This was an offer that was nearly three times more per acre than what the plaintiff had paid for in 1993. It would have been an irresistible offer made by the third defendant to Chong to purchase Lot 53.

[89] As the third defendant had testified, having agreed on the price, Chong through his agent Sharkawi and the third defendant then engaged DW5 as their common solicitor to act for them in the transaction. When DW5 advised them that there was no sign of any ongoing transactions at the time of the search and that there was no caveat lodged by anyone, Chong, Sharkawi and the third defendant would have realised that the plaintiff had not taken any action to protect his interest and right in the land. They knew then that they could proceed to seal the deal by signing the sale and purchase agreement dated 6 July 2004 (Bundle C, pp 5–13). To my mind, this was the height of their dishonesty and wilful act to deprive the plaintiff of his land.

[90] With the demise of Chong on 10 August 2005, and the plaintiff still in the dark about the approval of the subdivision of the land and had not taken any action to caveat his interest in the land, Sharkawi, the first and second defendants and the third defendant in July 2009 signed the memorandum of transfer which was submitted by DW5 for registration to the Lands and Surveys Department. Again, I say that Sharkawi, by then the agent of the first and second defendants as administrators of the estate of Chong, and the third defendant had acted dishonestly to defraud the plaintiff of his one acre land in Lot 53. The transfer of the entire rights in Lot 53 by the first and second defendants to the third defendant was therefore wrongful and an act of fraud against the plaintiff's rights, title and interest in the land.

CONCLUSION

[91] For the reasons stated above, I was more than satisfied that the plaintiff had proved on balance of probabilities that:

(a) the plaintiff had bought one acre of Lot 53 as testified by him and PW2 and evidenced by the agreement dated 27 October 1993 (exh P1);

(b) that as a purchaser under the agreement the plaintiff had an interest in the land in law and equity;

(c) that the third defendant was a party to fraud to wilfully and consciously deprive the plaintiff of his rights in his one acre portion of Lot 53; and

(d) as such, the third defendant was not a bona fide purchaser for value and his title in Lot 53 was defeasible.

[92] It followed from what has been said above that the registration of the memorandum of transfer dated 21 July 2009 and the issue document of title of Lot 53 in the name of the third defendant were void against the plaintiff. For these reasons I made the declarations and orders as stated above.

[93] Costs of the action for the plaintiff in the sum of RM15,000 was

ordered because the issue of fraud is nearly always a complex and difficult matter as it is a question of fact to be determined according to the circumstances of each case. The trial was staggered over a period of four months (partly because I came from Sibu to hear this case) and we needed six days of sitting to complete it. A total of nine witnesses testified. To my mind, the sum awarded was just and reasonable.

Plaintiff's action allowed.

Reported by Dzulqarnain Ab Fatar